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OCT 24 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER) No. 04-1761
OF THE STATE BAR OF ARIZONA,)

BARRY G. NELSON,
Bar No. 006746

RESPONDENT.)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

A Probable Cause Order was filed on April 4, 2005. A Tender of Admissions and Agreement for Discipline by Consent (Tender) and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent (Joint Memo) were filed on July 21, 2005. A hearing on the Tender and Joint Memo was held on September 1, 2005.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was and is an attorney admitted to practice law in the State of Arizona, having been admitted to practice on or about May 16, 1981.

2. The Probable Cause Panelist, pursuant to Rule 54(b)(4), Ariz.R.S.Ct., found that probable cause existed to issue complaint against Respondent for violations of Rule 42, Ariz.R.S.Ct., including but not limited to

1 ER 8.4. The probable cause order was filed April 4, 2005 with the Disciplinary
2 Clerk.

3
4 3. Without authorization or lawful entitlement Respondent used the
5 notary seal of Respondent's legal assistant to purportedly acknowledge the
6 signatures of Mr. Randy Jumper and his then-fiancée, Ms. Ylaena Howard on
7 their prenuptial agreement.

8
9 4. Respondent engaged in conduct that violated ER 8.4(c) (conduct
10 involving dishonesty, fraud, deceit or misrepresentation).

11 5. Respondent further tenders more specific conditional admissions as
12 set forth hereafter.

13
14 **COUNT ONE**

15 6. Respondent resides and maintains his legal practice in Tucson,
16 Arizona; and, Respondent is a certified domestic relations specialist.

17 7. Respondent represented Mr. Randy Jumper in various personal and
18 business matters from 2001 through May 15, 2004.

19
20 8. On Saturday, May 15, 2004, the scheduled day of his wedding, Mr.
21 Jumper called Respondent and requested assistance with the review and possible
22 modification of a prenuptial agreement that was prepared at an earlier time by
23 another lawyer who was not available to meet the parties. Respondent agreed to
24 meet with Mr. Jumper and his fiancée (Ylaena Howard).
25

1 9. On May 15, 2004, Mr. Jumper and his fiancée arrived at
2 Respondent's office with two other individuals, who subsequently on May 15,
3 2004, signed as witnesses to the execution of the prenuptial agreement.
4

5 10. Mr. Jumper and Ms. Howard requested that Respondent
6 acknowledge their signatures on the prenuptial agreement prior to their wedding.
7

8 11. Respondent acknowledges that he performed only a cursory review
9 of the agreement for the purposes of identifying the document to be notarized.
10

11 12. Respondent is not a notary public in the State of Arizona.
12

13 13. Respondent acknowledged the signatures of Mr. Jumper and Ms.
14 Howard on the prenuptial agreement by signing his legal assistant's name (i.e.,
15 Nadine M. Preciado) and using her notary seal, which had an expiration date of
16 August 5, 2002.
17

18 14. Nadine M. Preciado was employed by Respondent during May of
19 2004; and, Ms. Preciado has been Respondent's legal assistant for approximately
20 sixteen (16) years; and, Ms. Preciado did not at any time authorize Respondent to
21 sign her name as the notary public acknowledging the signatures of Mr. Jumper
22 or Ms. Howard on any document or prenuptial agreement.
23

24 15. On May 17, 2004, due to concern as to the validity of the agreement
25 as signed on May 15, 2004, Mr. Jumper and Ylaena R. Jumper executed an

1 addendum and affirmation of the prenuptial agreement which was signed and
2 duly acknowledged before a notary public, State of Arizona.

3
4 16. Respondent disclosed to his legal assistant on May 17, 2004, that he
5 had used her notary seal and signed her name as the notary public,
6 acknowledging the signatures of the above referenced persons.

7
8 17. On or about October 18, 2004, the State Bar of Arizona received a
9 complaint signed by Mr. Jumper and submitted against Respondent.

10 18. In response to Bar Counsel's investigation of Mr. Jumper's
11 complaint, Respondent admitted signing his legal secretary's name, as the notary
12 public acknowledging the signature's appearing on the prenuptial agreement and
13 affixing a notary public seal to the agreement.
14

15 **CONDITIONAL ADMISSIONS**

16 Respondent conditionally admits that his conduct, as set forth above,
17 violated Rule 42, Ariz. R. S. Ct., specifically ER 8.4(c).
18

19 **ABA STANDARDS**

20 The *ABA Standards* list the following factors to consider in imposing the
21 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
22 actual or potential injury caused by the lawyer's misconduct, and (4) the
23 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*
24
25

1 A review of ABA *Standard* 4.0 (Violations of Duties Owed to Clients) and
2 *Standard* 5.0 (Violations of Duties Owed to the Public) indicates that the
3 presumptive sanction for Respondent's misconduct falls somewhere between
4 suspension and censure. *Standard* 4.62 (Lack of Candor) specifically provides:

6 Suspension is generally appropriate when a lawyer
7 knowingly deceives a client, and causes injury or potential
8 injury to the client.

9 *Standard* 5.13 (Failure to Maintain Personal Integrity) specifically provides:

10 Reprimand (censure in Arizona) is generally appropriate
11 when a lawyer knowingly engages in any other conduct that
12 involves dishonesty, fraud, deceit, or misrepresentation and
13 that adversely reflects on the lawyer's fitness to practice
14 law.

15 Respondent violated his duties to the client and the public by purportedly
16 and without authority acknowledging a prenuptial agreement by using his legal
17 assistant's name and utilizing her expired notary stamp. Respondent's conduct
18 made it necessary for the parties to the agreement to reaffirm the prenuptial
19 agreement in order to assure that it was legally binding.

20 Respondent conditionally admits that on May 15, 2004, he knowingly
21 signed his legal assistant's name to a prenuptial agreement and used her notary
22 stamp to acknowledge the document. However, if this matter went to hearing,
23 Respondent would assert that he was merely trying to accommodate his client
24 (i.e., Mr. Jumper), who sought his assistance and asked Respondent to
25

1 acknowledge the signatures of the parties to the prenuptial agreement, because
2 Mr. Jumper and his fiancée were getting married on the same day. In addition,
3 Respondent would take the position that signatures on the prenuptial agreement
4 were not acknowledged by him with the intent to defraud because all the parties
5 were aware that Respondent was signing his legal assistant's name as the notary
6 public and using her notary seal.
7

8
9 If this matter went to hearing, the State Bar would argue that Respondent's
10 conduct violated his ethical obligations to his client, the profession and the
11 public; and, Respondent's admitted conduct was performed with a knowing state
12 of mind.
13

14 Respondent takes the position that his conduct was not intended to deceive
15 the client or to benefit himself, and caused no actual harm because the agreement
16 was subsequently reaffirmed and the signors' signatures were properly
17 acknowledged by a notary public. The complainant/client (Mr. Jumper) became
18 aware of the legal issue related to the acknowledgement of the prenuptial
19 agreement by Respondent; and, thereafter the prenuptial agreement was
20 reaffirmed, and amended and properly acknowledged by a notary public and
21 reviewed by another attorney.
22
23

24 The State Bar takes the position that there was the appearance of fraud and
25 potential injury to the client, because the acknowledgment of the signatures was

1 invalid and the validity of the prenuptial agreement was thus clouded by the invalid
2 acknowledgment of signatures. Respondent would urge that, if this matter
3 proceeded to hearing in this jurisdiction, the signatures of the parties to a prenuptial
4 agreement do not have to be acknowledged in order for the agreement to be binding
5 and enforceable. Additionally, the signatures by parties to the agreement in this
6 matter were separately witnessed by two individuals, whose names appear on the
7 prenuptial agreement executed on May 15, 2004.
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10 Due to several mitigating factors, the matter qualifies for reduction to
11 censure with restitution of legal fees.
12

13 **AGGRAVATING AND MITIGATING FACTORS**

14 This Hearing Officer then considered aggravating and mitigating factors in
15 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
16

17 This Hearing Officer agrees with the parties that there is only one
18 applicable aggravating factor in this matter:

19 (i) substantial experience in the practice of law.¹

20 This Hearing Officer agrees with the parties that three factors are present in
21 mitigation:
22

23 (a) absence of a prior disciplinary record;
24

25 ¹ Respondent was admitted in 1981.

1 (b) absence of a dishonest or selfish motive; and,

2 (e) full and free disclosure to disciplinary board or cooperative attitude
3 toward proceedings.
4

5 PROPORTIONALITY REVIEW

6 The Supreme Court has sought to consider similar lawyer discipline cases
7 in an attempt to assess the proportionality of the sanction recommended. *See In*
8 *re Struthers*, 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court
9 has recognized that the concept of proportionality review is “an imperfect
10 process.” *In re Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is
11 because no two cases “are ever alike.” *Id.*
12

13 To have an effective system of professional sanctions, there must be
14 internal consistency, and it is appropriate to examine sanctions imposed in cases
15 that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772.
16 However, the discipline in each case must be tailored to the individual case, as
17 neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. ¶ 61,
18 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In*
19 *re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
20
21

22 In *In re Miranda*, SB-02-0090-D, the Supreme Court issued an order of
23 censure and placed Respondent on six months of probation with specific terms.
24 Miranda was found to have violated ERs 8.4(c) and (d) based on the finding that
25

1 she had signed pleadings of behalf of her client, then acknowledged those
2 pleadings as if the client had actually signed the pleadings herself. The court
3 found that, along with violating ERs 3.3 and 8.1, and Rule 51 (h) and (i),
4 Ariz.R.S.Ct. Miranda had also engaged in conduct involving dishonesty and
5 misrepresentation in violation of ERs 8.4(c) and (d). Two factors were found to
6 be present in aggravation: a pattern of misconduct and submission of false
7 evidence, false statements, or other deceptive practices during the disciplinary
8 process. There were six (6) factors in mitigation: absence of prior disciplinary
9 record; absence of a dishonest or selfish motive; full and free disclosure to
10 disciplinary board or cooperative attitude toward proceedings; inexperience in the
11 practice of law; character or reputation; and remorse.

15 *In re Charles*, 174 Ariz. 91, 847 P.2d 592 (1993), the Disciplinary
16 Commission and the Supreme Court found that Charles knowingly presented a
17 power of attorney to a bank twelve (12) days after the signer-client's death and
18 that Charles twice presented powers of attorney signed by Charles instead of the
19 client; and, this conduct involved misrepresentation and dishonesty which
20 violated ER 8.4(c), Ariz.R.S.Ct. In addition, the Court found that,
21 notwithstanding the fact that Charles intended no personal gain in signing his
22 name on powers of attorney naming himself as attorney in fact was dishonest.
23 The Supreme Court stated that, signing someone else's name to a document and
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1 presenting it as an authentic signature was both dishonest and a
2 misrepresentation. Charles' apparent belief that "the end justifies the means" did
3 not relieve him of his responsibility to maintain his professional integrity. Id, at
4 93, 594. The Commission indicated that the appropriate sanction fell between a
5 period of suspension and a censure and that Charles' poor judgment and the
6 serious consequences that resulted from his conduct made a lesser sanction such
7 as dismissal or an informal reprimand) inappropriate. In concluding that censure
8 was the appropriate sanction, the Supreme Court found no aggravating factors
9 and in mitigation held that Respondent had no prior discipline and no selfish
10 motive. Id., at 93, 594.

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14 *Miranda* can be distinguished from the instant case because it exhibits
15 more serious misconduct, but resulted in less than the presumptive sanction (i.e.,
16 suspension) being imposed. *Miranda* knowingly misrepresented to the court and
17 opposing counsel that her client had actually signed the pleadings.

18
19 As in *Charles*, Respondent in the instant case demonstrated poor judgment
20 in notarizing documents when he did not have the prerequisite authority to do so.
21 Notwithstanding Respondent having disclosed his lack of authority to
22 acknowledge documents to Complainant and his fiancée, the Respondent's
23 conduct was a dishonest act of misrepresentation with the potential for fraud, as
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1 in *Charles*. Thus, Respondent's conduct was incompatible with his duties and
2 responsibilities as a lawyer.

3
4 The parties agree that the circumstances of the instant case justify a
5 censure. The restitution of fees to Mr. Jumper is based on the amount actually
6 paid by Mr. Jumper to Respondent for professional services on May 15, 2004;
7 and Complainant suffered a financial loss (i.e., retaining counsel to correct the
8 defect in execution and acknowledgment of the agreement of May 15, 2004),
9 which should be compensated by restitution. This agreement provides for a
10 sanction that meets the goals of the disciplinary system. The terms of this
11 agreement serve to protect the public, instill confidence in the public, deter other
12 lawyers from similar conduct and maintain the integrity of the bar.
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15 RECOMMENDATION

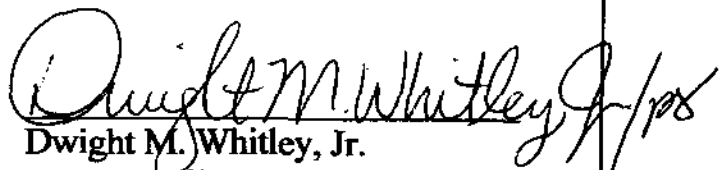
16 The purpose of lawyer discipline is not to punish the lawyer, but to protect
17 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
18 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
19 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
20 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
21 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
22 (1994).
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1 In imposing discipline, it is appropriate to consider the facts of each case,
2 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
3 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
4 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
5

6 Upon consideration of the facts, application of the *Standards*, including
7 aggravating and mitigating factors, and a proportionality analysis, this Hearing
8 Officer recommends acceptance of the Tender of Admissions and Agreement for
9 Discipline by Consent and the Joint Memorandum in Support of Agreement for
10 Discipline by Consent which provides for the following:
11

- 12 1. Respondent shall be censured.
- 13
- 14 2. Respondent shall pay restitution in the amount of \$250.00 to Randy
15 Jumper within thirty days of the effective date of the final judgment and order.
- 16
- 17 3. Respondent shall pay the costs and expenses incurred in this
18 disciplinary proceeding.

19 DATED this 24th day of October, 2005.

20 
21 Dwight M. Whitley, Jr.
22 Hearing Officer 9I

23 Original filed with the Disciplinary Clerk
24 this 24th day of October, 2005.
25

1 Copy of the foregoing was mailed
2 this 24th day of October, 2005, to:

3
4 Barry G. Nelson
5 Respondent
6 *West, Christoffel and Zickerman, P.L.L.C.*
7 2870 North Swan, Suite 100
8 Tucson, AZ 85712-6303

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